IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 629 OF 2014

Vijay s/o Pandharinath Magar,
Age : 28 years, Occu : Agri.,
R/o. Gogalgaon, Tq. Rahata,
Dist. Ahmednagar. ...**Appellant**

Versus

The State of Maharashtra ...**Respondent**

.....

Appearance : -
Shri. V. R. Dhorde, Advocate for the appellant
Shri. K. S. Patil, APP for respondent/State

.....

CORAM : V. K. JADHAV &
SANDIPKUMAR C. MORE, JJ.

ARGUMENTS CONCLUDED ON : 04.12.2021
JUDGMENT PRONOUNCED ON : 06.01.2022

JUDGMENT [*Per V. K. Jadhav, J.*] **: -**

1. This appeal is directed against the judgment & order of conviction passed by the learned Additional Sessions Judge, Kopargaon dated 22nd August, 2014 in Sessions Case No. 4 of 2013.

2. Brief facts giving rise to the prosecution case, are as under:-

Deceased-Aruna was the wife of appellant-accused. Accused was working as Watchman with D.Pharmacy College,

Mahodarigaon, Tq.Sinnar, Dist. Nashik. Deceased-Aruna was working with Maharashtra State Road Transport Corporation as ST Bus Conductor at Mandangad Depo, Dist. Ratnagiri. The marriage between the appellant-accused Vijay and the deceased-Aruna was solemnized on 11th March, 2012 at Rankhamb, Tq. Sangamner, Dist.Ahmednagar. Incident had taken place on 28th June, 2012 between 08:00 to 08:30 pm. It is the case of the prosecution that from 26th June 2012 to 29th June, 2012 the deceased was assigned with the duty of conductor of ST bus having route from Mandangad to Shirdi. On 28th June, 2012 at about 01:30 pm, the said bus left for Pune and reached Shirdi at 07:00 pm. PW3 - Chandrakant Ashok Jawale was the driver of the said ST bus and deceased-Aruna was the conductor. Appellant-accused Vijay had been to Shirdi to fetch deceased-Aruna. From Shirdi, deceased-Aruna went along with the appellant-accused on his motorcycle as a pillion rider to her matrimonial home situated at village Gogalgaon, Tq. Rahata, Dist. Ahmednagar. PW1-Dnyandeo Ghorpade, who happened to be the Sarpanch of Pimpri Nirmal then, received a call on his phone between 08:00 to 08:30 pm intimating him that on Pimpri Nirmal to Gogalgaon road, one lady is lying on the bund and one person is crying thereon on the road. Said Dnyandeo Ghorpade had thus immediately rushed towards the spot. On reaching there, he found

one lady lying naked on bandh (embankment) and one person crying for water. He had immediately given information to the Loni Police Station. The said woman was found dead. It was a dead body of deceased-Aruna and the person found crying there on the spot was the appellant-accused.

3. According to the prosecution, deceased-Aruna had informed her brother PW2-Dagadu that the appellant-accused was suspecting about her character and further threatened her to kill on that count. It is the case of the prosecution that the appellant-accused Vijay had committed the murder of deceased-Aruna by constricting her neck whereas; it is the defence story that while proceeding by the road three thieves riding on motorcycle chased the appellant-accused and deceased-Aruna, stopped them, extended beating to both of them, taken away forcibly the cash and other articles in possession of accused and deceased. The prosecution claims that the deceased-Aruna died due to asphyxia as a result of strangulation. Deceased-Aruna met with homicidal death. The appellant-accused has failed to give any explanation about her homicidal death.

4. Initially, on the basis of the report (Exh.15) submitted by PW1-Dnyandeo Ghorpade, Sarpanch of the village Pimpri Nirmal, Tq.

Rahata, Dist. Ahmednagar, the A.D. was registered on 28th June, 2012 and during the course of the enquiry of the A.D., PW2-Dagdu Gulve, the brother of the deceased-Aruna, had lodged the complaint (Exh.17) on 29.06.2012. On the basis of his complaint, Crime No. 92/2012 for the offences punishable under Sections 302, 498A, 323 came to be registered at Loni Police Station against the appellant-accused.

5. PSI-Shirke was assigned with the investigation, however, before the trial was commenced, PSI-Shirke died. Police Naik-Deepak Barde had drawn the inquest panchanama on the dead body as directed to him by PSI-Shirke. He has also taken into custody the clothes of the deceased and those articles were scarf, petticoat, nicker and saree. The said inquest panchanama was carried out at mortury of the hospital (Exh.31). At about 07:30 pm in the evening, PSI had called two panch witnesses and accordingly, the seizure memo was prepred for seizure of those articles. PW14-API-Devidas Pawar has deposed on behalf of the prosecution on the basis of the entries in the police diary in respect of the investigation carried out by the PSI-Shirke. As per the prosecution, after due investigation the charge-sheet has been submitted against the accused.

6. The learned Additional Sessions Judge, Kopargaon has framed charge against the appellant - accused vide Exh.6 for the offence punishable under Sections 498A, 302, 323 and 201 of the IPC. The contents of the charge were read over to the appellant-accused. The appellant-accused pleaded not guilty and claimed to be tried.

7. Prosecution has examined in all 14 witnesses to substantiate the charges levelled against the appellant-accused. After completion of the prosecution evidence, the statement of the appellant-accused came to be recorded under Section 313 ofthe Cr.P.C. (Exh.55). The appellant-accused has filed Written Statement. It is the defence of the appellant-accused that on the day of the incident he had been to Shirdi to fetch deceased-Aruna and thereafter they started proceeding towards village Gogalgaon on the motorcycle. Appellant-accused was himself driving motorcycle and the deceased-Aruna was the pillion rider. On the way they were attacked by theree thieves, who were on motorcycle and the said thieves chased them and commited the murder of deceased-Aruna. He has been falsely implicated in the offence in question. The appellant-accused has examined one defence witness Kishan Kotkar, Advocate & notary, to prove an agreement (Exh. 61).

8. The learned Addl. District Judge, Kopargaon by judgment and order of conviction dated 22nd August, 2014 in Sessions Case No. 4 of 2013 has convicted the appellant-accused for the offence under Section 302 of the IPC, however, acquitted of the offences under Sections 498A and 323 of the Indian Penal Code. The learned Addl. District Judge, Kopargaon has convicted the appellant-accused in the manner as reproduced hereinbelow. The operative part of the said judgment and order of coviction reads as under :

(1) Accused Vijay Pandharinath Magar is hereby convicted under section 235 (1) of the Code of Criminal Procedure to suffer life imprisonment for offence under section 302 of Indian Penal Code and to pay fine of Rs.2,000/- in default three months simple imprisonment.

(2) Accused Vijay Pandharinath Magar is hereby acquitted under section 235 (1) of the Code of Criminal Procedure for offences punishable under sections 498A and 323 of Indian Penal Code.

(3) Accused Vijay Pandharinath Magar is under trial prisoner.

(4) Accused Vijay Pandharinath Magar is entitled for set off of period of his pre-trial detention in prison under section 428 of Code of Criminal Procedure.

(5) Muddemal property comprising wearing clothes, footwear being worthless be destroyed after the period of appeal.

(6) Muddemal property comprising S.T. Bus ticket machine, tray, ticket hole maker and amount of Rs.6,400/- be returned to Manager, Mandangad Bus Depot after period of appeal.

(7) Muddemal property comprising 14 yellow metal mani and two ear-rings be handed over to complainant after period of appeal. (Office to get certificate of Goldsmith for these articles forthwith within 8 days.)

(8) Copy of this judgment be furnished to accused free of charge today itself.

(9) Delivered in open Court."

9. The learned Counsel for the appellant submits that the prosecution case entirely rests upon circumstantial evidence. There is no direct evidence in this case. The learned Counsel submits that there is no chain of circumstantial evidence to point out unerringly the guilt of the accused leaving no scope to draw any other inference. The learned Counsl submits that the appellant-accused has raised defence about the assault by the thieves. The deceased-Aruna had sustained the impact abrasion and lacerated contusions all over body indicating that either she had sustained the injuries by fall from the motorcycle or the struggle with the thieves. The learned Counsel submits that there are two views of a story, one that was contended by the accused should be accepted.

10. The learned counsel for the appellant-accused submits that the motive plays a great role, if the prosecution case rests upon circumstantial evidence. Deceased-Aruna got married with the appellant-accused some 03 months 17 days prior to her death. She was residing at Mandangad (place of job) along with her mother. Even at the time of incident, the said mother was with deceased-

Aruna at her job place at village Mandangad. Deceased-Aruna had stayed in her matrimonial home with appellant-accused for few days of her marriage leave and thereafter went to the job place at village Mandangad, a place which is far away from her matrimonial home. The learned Counsel submits that there are no instances indicating that deceased-Aruna was subjected to ill-treatment/cruelty by suspecting about her character by appellant-accused at any point of time. On the other hand, it has come in the prosecution evidence that the appellant-accused had been to village Mandangad to meet his wife and further stayed there for eight days. The prosecution has not examined the mother of deceased-Aruna. PW2-Dagdu, brother of the deceased-Aruna, has depoed that deceased-Aruna had informed him on phone that appellant-accused was suspecting about her character and threatened to kill her, however, there are no details as to when those threts were given. Learned counsel for the appellant-accused submits that it is unbelievable that for such a short span after the marriage the appellant-accused started suspecting about the character of the deceased-Aruna. Learned counsel submits that the prosecution has failed to prove the motive on the part of the appellant-accused to commit the murder of his wife.

11. The learned counsel submits that there is no chain of circumstantial evidence. On the other hand, there are suspicious

circumstances about the recovery at the instance of the appellant-accused in presence of the highly interested witnesses who acted as panch witnesses to the said recovery panchanama. The learned counsel submits that most of the articles of the MSRTC shown to have been recovered at the instance of the appellant-accused, when those articles i.e. the tray of ticket and cash bag is necessary to be deposited at the place of destination. PW3-Chandrakant Jawale, driver of the said ST bus, has also deposed that deceased-Aruna had submitted the tray and went along with the husband. The learned Counsel submits that the prosecution has failed to prove the case beyond reasonable doubt against the appellant accused. Merely on the basis of the blood of blood group 'B' appeared on the shirt of the appellant-accused, is not enough to convict the appellant-accused especially when the appellant-accused was found near the body of the deceased on road while crying. The learned Counsel submits that even the trial Court has not considered the defence evidence. Exh.61 is the agreement executed by PW2-Dagdu, the brother of deceased-Aruna, wherein he has accepted that the appellant-accused is not responsible for the death of his sister deceased-Aruna. The learned counsel submits that the appellant-accused is entitled for the benefit of doubt.

12. The learned Counsel for the appellant-accused in order to substantiate his contention has placed reliance on the following cases:-

i] **Vikramjit Singh Alias Vicky Versus State of Punjab**
(2006) 2 SCC 306.

ii] **Prakash Versus State of Karnataka**
(2014) 12 SCC 133

iii] **State of Haryana Versus Ram Singh**
(2002) 2 SCC 426

iv] **Maruti Rama Naik Versus State of Maharashtra**
(2003) 10 SCC 670

13. The learned APP submits that the prosecution has proved the chain of circumstantial evidence. The appellant-accused was found at the place of incident near the dead body of the deceased-Aruna. The appellant-accused had sustained minor simple injuries less in numbers whereas, the deceased had almost 23 injuries on her person. The prosecution has proved the homicidal death. The appellant-accused has not given satisfactory explanation for the homicidal death of Aruna, as required under Section 106 of the Evidence Act. The burden of proving the fact especially within knowledge is on the appellnat-accused, however, the appellant has not examined himself. Learned APP submits that if the accused fails to offer his reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in chain of circumstantial evidence proved against him. Learned APP submits

that the incriminating articles came to be recovered at the instance of the appellant-accused and there is no reason to discard the evidence of the panch witnesses only on the ground that they are interested witnesses. There is a satisfatoy evidence about the motive. Appellant-accused was suspecting about the character of the deceased-Aruna. The prosecution has proved its case beyond reasonable doubt against the appellant-accused. The trial Court has rightly convicted the appellant-accused. There is no substance in the appeal. The same is liable to be dismissed.

14. We have perused the material exhibits tendered by the prosecution, the evidence of the prosecution witnesse; the statement of the appellants-accused recorded under Section 313 of Criminal Procedure Code and the impugned judgment.

15. Prosecution case entirely rests upon circumstantial evidence and there is no direct evidence in this case. It is not disputed that on 28.06.2012, appellant-accused Vijay had picked up deceased-Aruna from Shirdi bus stand. On way near Pimpri Nirmal village, incident had taken place at about 08:00 to 08:30 pm. The prosecution claims that the appellant-accused was suspecting about the character of his wife deceased-Aruna. Thus, on that day, appellant-accused had committed the murder of deceased-Aruna by

strangulating her by means of scarf. It is the defence case that on 28.06.2012, appellant-accused started proceeding towards Shirdi from Gogalgaon on his motorcycle along with his wife deceased-Aruna. He had picked up deceased-Aruna from Shirdi bus stand at about 08:00 to 08:30 pm in the night and on way within the limits of Pimpri Nirmal road, three thieves came on the motorcycle, extended beating to both of them and committed the murder of deceased-Aruna and they took away the golden ornaments and money.

HOMICIDAL DEATH : -

16. So far as the Homicidal Death of Aruna is concerned, prosecution has examined PW6–Dr. Vikrant Sanjay Kalokhe (Exh.28). PW6 – Vikrant has conducted the postmortem on the dead body of the deceased-Aruna on 29.06.2012. PW6-Vikrant has noted near about 20 abrasions mark on the various parts of the body and also noted two lacerated wounds below lower margin of lower lip at mid par and another one is subcutaneous deep present at chin. In addition to these, Dr. Vikrant has noted a continuous transeverse ligature mark as pressure abrasion over thyroid cartilage, encircling all around neck, dark reddish at anterior aspect of mid part of neck and faint at other part. According to him, the distance of upper border of ligature mark from chin is 5 cm from right and left mastoid

7 cm from sternal notch lower borderr is sitauted 6 cm above. He has given all the details of the said ligature marks.

16.1 On internal examination, PW6 – Dr. Vikrant has found following internal injuries to deceased-Aruna.

Head : Under scalp contusion present at left frontal temporal and high parietal of size 6 x 3 c.m., 3 x 2 c.m., 1.5 x 1 c.m., respectively and right high parietal, occipital of size 4 x 2 c.m., 5 x 3 c.m., respectively and left occipital 2 x 2 c.m., all are reddish in colour.

16.2 On neck dissection, PW6 – Dr. Vikrant has noted extravasation of blood present in subcutaneous tissues, muscles of neck, posterior wall of trachea, anterior wall of eso phagous larynx. Fracture of hyoid bone present on right side. No evidence of fracture of thyroid and cricoid cartilages.

16.3 According to PW6 – Dr. Vikrant Kalokhe, all the injures are ante-mortem. He has stated that most of the injuries are about abrasions and there is one fracture to hyoid bone. In his opinion, the cause of death of Aruna is asphyxia as a result of strangulation. He has further opined that the injuries of abrasions may be possible by hard and blunt object or in struggle or fall. The post-mortem report

bears his signature. The contents of the same are true and correct as per his evidence. The same is marked as Exh. 28. There is nothing in the cross-examination to disbelieve the expert's evidence or to draw any other inference about the death. Thus, considering injury no. 18, which is a continuous transeverse ligature mark with the corresponding internal injuries especially the fracture of hyoid bone on the right side clearly depicts that the deceased-Aruna died due to asphyxia as a result of strangulation. The abrasions and contusions may be possible in struggle or fall. PW6- Dr. Vikrant has also admitted that the injuries no. 1 to 17 are possible if person falls on ground. According to him, injury no. 19 to 23 are simple injuries, however, injury no. 18 is the only injury which is grievous in nature. The prosecution has proved that the deceased Aruna met with a homicidal death with no other possibility.

LAST SEEN : -

17. So far as the prosecution evidence under the caption of 'last seen' is concerned, it is not disputed by the defence that on 28.06.2012 appellant-accused had picked up deceased-Aruna from Shirdi bus stand. In fact, appellant-accused Vijay had gone to Shirdi to fetch deceased-Aruna. Though the matrimonial home of deceased Aruna is situated at village Gogalgaon, Dist. Ahmednagar, she was serving as a Conductor in State Transport and posted at Mandangad,

Dist. Ratnagiri. She was on duty as a Bus Conductor from 26.06.2012 to 29.06.2012. PW3- Chandrakant Jawale was the driver and deceased-Aruna was the conductor of the ST bus having route from Mandangad to Shirdi. Probably, deceased-Aruna had taken the said duty so as to visit her matrimonial home at Gogalgaon, which is not far away from Shirdi. On 28.06.2012, the said ST bus started from Pune at about 1.30 pm and reached Shirdi at about 07:00 pm in the evening. On reaching there, after completing the necessary formalities, deceased-Aruna joined the company of appellant-accused Vijay and went along with him. At about 08:00 to 08:30 pm, incident had taken place on the road from Shirdi to Gogalgaon within the limit of Pimpri Nirmal. It is also not the case of the prosecution that the appellant-accused Vijay had chosen some different route for proceeding to village Gogalgaon. In the backdrop of these facts, it is necessary to see as to what is the motive in this case.

MOTIVE : -

18. It is well settled that if the prosecution case rests upon a circumstantial evidence, motive plays the great role. In the instant case, PW2-Dagdu Salba Gulve, who is the brother of deceased-Aruna, has deposed about the motive. According to him, he was intimated by his sister deceased – Aruna on phone number 9011819217 that the appellant-accused Vijay is taking doubt on her character. There is

no date or time mentioned in respect of the said phone call. PW2-Dagdu further deposed that he had called deceased-Aruna and appellant-accused Vijay at village Rankhamb. He further deposed that the appellant-accused Vijay had expressed his no-objection for carrying out service by deceased-Aruna as Conductor with MSRTC and accordingly, they left for Gogalgaon. Deceased-Aruna went to Mandangad from Gogalgaon. PW2-Dagdu has further deposed that three days thereafter, the appellant-accused Vijay went to Mandangad. The said fact was intimated to him by deceased-Aruna on phone. After eight days, the appellant-accused Vijay returned back to Gogalgaon. PW2-Dagdu has deposed that he had received a phone call of his siter Aruna intimating him that the appellant-accused Vijay had threatened to kill her. Even deceased-Aruna told him that the accused Vijay asked her to take duty and came to Shirdi.

18.1 In order to appreciate the evidence of PW2-Dagdu, it is necessary to repeat here certain dates. The marriage of deceased-Aruna with appellant-accused Vijay was solemnized on 11.03.2012 and the alleged incident had taken place on 28.06.2012. Thus, within 03 months and 17 days of the marriage, deceased-Aruna died. PW2-Dagdu has admitted in his cross-examination that deceased-Aruna had been serving as ST Bus Conductor in MSRTC three years

prior to her marriage. It thus appears that the appellant-accused Vijay and deceased-Aruna got married when the appellant-accused was knowing that the deceased-Aruna was serving as a Bus conductor. The appellant-accused Vijay was also serving in a D. Pharmacy College as Watchman. The marriage had taken place with the consent of both. PW2-Dagdu has further admitted that the marriage was solemnized in a common marriage sammelan in their village. He had further admitted that the deceased-Aruna, at the time of her marriage, had availed a month's leave commencing eight days prior to her marriage. After marriage, deceased-Aruna went to Gogalgaon at her matrimonial home and remained there for three days and thereafter she was taken to her parents house at village Rankhamb where she stayed for three days. Thereafter she was again taken to her matrimonial home at Gogalgaon. PW2-Dagdu has further stated in his cross-examination that deceased Aruna stayed at Gogalgaon for 8 to 10 days. PW2-Dagdu went to Gogalgaon one day before Padva festival to bring Aruna. Generally, Padva festival comes in last week of March or first week of April of every year. PW2-Dagdu further deposed that after Padva festival, deceased-Aruna went to Mandangad along with her mother. It thus appears that deceased-Aruna had hardly stayed in her matrimonial home not more than ten to twelve days after her marriage. PW2-Dagdu has further

admitted that before going to Mandangad, appellant-accused and deceased-Aruna had visited village Rankhamb on motorcycle and after having meals, both of them again went back to Gogalgaon. PW2-Dagdu has further admitted that his mother was residing with deceased-Aruna prior to the marriage and even after marriage mother had stayed with deceased-Aruna for one month. He has also admitted that when the incident had taken place, his mother was at Mandangad. PW2-Dagdu never went to Mandangad after the marriage of deceased. PW2-Dagdu has only given reference in his examination-in-chief that after appellant-accused Vijay and deceased-Aruna had been to his home, deceased-Aruna went to join duty at Mandangad and three days thereafter, appellant-accused Vijay also went to Mandangad and stayed there near about eight days. It is pertinent that there are no allegations about any ill-treatment being extended to deceased-Aruna by suspectig about her character by appellant-accused Vijay. Deceased-Aruna had never complained about it. PW2-Dagdu has given a vague reference of the phone call without giving the details of date, time and place. Even though PW2-Dagdu had called appellant-accused Vijay and deceased-Aruna at Rankhamb, there is no further reference as to whether PW2-Dagdu has questioned the appellant-accused Vijay about it. On the other hand, the appellant-accused Vijay had expressed himself that he has

no objection if his wife deceased-Aruna carries on her service in MSRTC as ST Bus Conductor. Even though deceased-Aruna had been to her parents' house at village Rankhamb after the threat allegedly given to her by appellant-accused Vijay, PW2-Dagdu when personally met her at that time, did not ask her as to what is the reason that the appellant suspecting about her character. In the backdrop of these facts, in our considered opinion, the mother of deceased-Aruna who was staying with her at Mandangad would have been the best witness since the appellant-accused Vijay on one occasion had stayed at Mandangad for eight days. PW2-Dagdu has also admitted that at the time of death, Aruna was carrying pregnancy of two months. Her sonography was carried out at P.M.T. Hospital by appellant-accused Vijay and his grandmother. PW2-Dagdu came to know about the said pregnancy from the appellant-accused and also from deceased-Aruna.

18.2 PW2-Dagdu has made material improvements to substantiate his contention about his allegations against the appellant-accused that he was suspecting about the character of deceased-Aruna. PW2-Dagdu has stated thus :

> *"I have told to police that I have call Aruna and Vijay at Rankhamb my village. I have told to police at that time Vijay had no objection for service of Aruna and they return back to Gogalgaon. I have told to police that thereafter Aruna went to Mandangad for her duty. I have told the police that thereafter accused went to Mandangad after three days according phone call intimation of Aruna. I have told the polcie that after eight*

days accused return back to Gogalgaon. I have told to police that my sister Aruna told that accused Vijay ask her to take duty at Shirdi. I cannot assign reason why above fact not mentioned in my complaint."

18.3 Thus, considering the entire aspect, it appears to us that PW2-Dagdu has stretched the things only after deceased-Aruna died otherwise than under normal circumstances. In our considered opinion, the prosecution has failed to establish the motive. It is needless to say that if the prosecution case rests upon circumstantial evidence, the motive is also required to be established or proved by the prosecution like any other circumstance.

19. There are two witnesses examined by the prosecution, who have rushed to the spot after little gap on the day of the incident. PW1-Dnyandeo Ghorpade had received a phone call from somebody of N.T. Nirmal Vasti on 28.06.2012 between 08:00 to 08:30 pm intimating him that one lady was lying on bund and one person is crying there on the road. PW1-Dnyandeo Ghorpade went to the spot and saw one lady lying in naked position and one person crying for water. He had made a phone call to Loni Police Station for giving report. He had orally informed the police which was reduced into writing. The said report is marked as Exh.15.

19.1 PW9-Balasaheb Nirmal has deposed that he is the owner of land Gut No. 443/1 at Pimpri Nirmal and his land is situated on Pimpri Nirmal to Gogalgaon road. On 28.06.2012, there was Haldi program of daughter of his cousin maternal uncle at Pimpri village. He was present for that program since morning. After completion of said program, when he was proceeding towards his village from Gogalgaon at 08:00 pm, he met one Rajendra Nirmal. Said Rajendra Nirmal informed him that one motorcycle is lying in the agricultural land of PW9-Balasaheb Nirmal. He further informed him that some untoward incident took place. PW9-Balasaheb thus rang up Ramnath Nirmal. Thus, Ramnath Nirmal and Santram Nirmal came to him and all of them four in numbers went towards the spot and on reaching there, PW9-Balasaheb found one motorcycle lying on northern side of road in side gutter and one lady lying at soutern side of that road. He further found one man making hue and cry seen in the light of focus of his motorcycle. The said lady was on blouse and petticoat only and her saree was lying besides her and there was scarf around her neck. He further stated that the said man was wearing baniyan. The said man was shouting and saying that thieves have beaten them. The said man came on road making hue and cry. Some more people who had attended the Haldi program also gathered on the spot. Thereafter, they have sent the said person in Maruti Car to

P.M.T. hospital at Loni. The police arrived on the spot and took away that lady in the ambulane.

19.2 PW1-Dnyandeo Ghorpade had exaggerated the things in the cross-examination. He has gone to the extent by saying that the hands and legs of appellant-accused Vijay found tied by means of saree before arrival of the police. He has also deposed that one khaki shirt, box of ticket and purse found in the southern side of ditch of motorcycle and in his presence, police has seized the same. According to him, the said seizure had taken place in the night of 28.06.2012 itself. However, it appears to us that PW1-Dnyandeo has won over by defence and thus he has given certain admissions to that effect.

19.3 However, we find the evidence of PW9-Balasaheb is trustworthy and reliable. He has admitted in his cross-examination that the said man means the appellant-accused Vijay told them that three persons came on Discover motorcycle and beaten them. He has also admitted that he has not told to the police that there was scarf around the neck of the lady.

19.4 It is the defence of the accused that as per his written statement (Exh.56) during his examination under Section 313 of the

Cr.P.C., that on 28.06.2012, three persons came on the spot on a Discover motorcycle. They were 30 to 35 years' age group wearing Jeans and T-shirts. They have committed the murder of his wife. On perusal of Exh.50, it appears that the statement of appellant-accused came to be recorded on 29.06.2012 when he was admitted in the hospital. The appellant-accused has explained as to how they were chased by three thieves on Discover motorcycle, aged 30 to 35 years, wearing Jeans and T-shirts and one of the said thieves had slapped below the ear of deceased-Aruna and thus she fell down on the ground. He was also caught hold of by them. The appellant-accused Vijay was caught hold by his neck and hence he could not raise any hue and cry. He has further explained in Exh.50 that his wife-deceased Aruna was lying unconscious. Those three thievs removed her saree and tied his hands and legs. However, it appears that, except recording his statement, nothing has been done on the basis of his complaint.

19.5 The appellant-accused Vijay has also examined DW1-Kishan Kotkar, Advocate and Notary. One agreement in writing was produced befor the Court. The said agreement is said to have been executed by PW2-Dagdu in favour of Pandharinath Magar. This agreement is titled as 'Supurdnama', executed on 100/- rupees bond

(Exh.61) and notarized before DW1-Kishan Kotkar, Advocate and Notary. The said agreement is executed in presence of two witnesses. It was executed on 10.07.2012 and on perusal of the said document (Exh.61), it appears that PW2-Dagdu has accepted that none ofthe family members including the appellant-accused Vijay is responsible for the death of deceased-Aruna. In fact, such an agreement is not enforceable, however, we have given reference of the said document for the reason that the appellant-accused Vijay has examined said Notary to substantiate his defence to the effect that he has been falsely implicated in the present crime.

19.6 On the basis of the evidence discussed above, two views are possible. As per the prosecution story, the appellant-accused Vijay had created a scene of robeery and the said crime that has been committed by the thieves and atually he has committed the murder of deceased-wife. The second view is also possible that some thieves have committed murder of the deceased-Aruna. We have already discuccsed while recording our opinion regarding homicidal death that there were number of abrasions on the person of deceased-Aruna. PW6 - Dr.Vikrant has also stated that said injuries are possible either by fall or struggle. Even assuming for the sake of discretion, the deceased-Aruna while resisting the attempt of the thieves

sustained the injuries or deceased-Aruna had sustained the injuries to save herself from the appellant-accused Vijay. However, prosecution has examined PW5-Dr. Tayyab Tamboli, who has examined the appellant-accused for the injuries on his person. He has noted following three injuries on the person of the appellant-accused.

i] Scratch (linear abrasion) bright red in colour, size 9.5 x 0.3 c.m., on left arm flexor aspect (anteriorly).

ii] Scratch (linear abrasion) bright red in colour, size 7 x 0.3 c.m., on left forearm upper half of flexor aspect.

iii] Scratch (linear abrasion) bright red, size 6.5 x 0.3, on left forearm upper half flexor aspect.

19.7 If appellant-accused Vijay has sustained those injuries as a result of struggle with his wife and even assuming that the appellant-accused had used the scarf to constrict the neck of deceased-Aruna and though deceased Aruna had sustained number of abrasions on her person, however, comparatively the accused had sustained the less injuries. However, in that event if injury no. 18 on the person of the deceased-Aruna is considered, the same is a continuous transeverse ligature mark as pressure abrasion present over thyroid cartilage encircling all around neck. There are no multiple ligature marks. It is thus difficult to reach out any conclusion or inference.

19.8 In view of the discussion above, we have searched for other evidence. PW3-Chandrakant Jawale, who is a ST driver, has deposed in his examination-in-chief itself that when they reached to Shirdi at about 07:00 pm in the evening on 28.06.2012 and when he parked ST bus and submitted log-sheet to the control room, deceased-Aruna also submitted the tray and went along with her husband.

19.9 Prosecution has examined PW10-Manohar Gholap, who is a panch witness on the panchanama (Exh.35). According to him, on 02.07.2012, the appellant-accused Vijay had shown them MSRTC ticket machine, tray, purse, ticket hole maker, wearing clothes of deceased, khaki shirt with broken buttons, saree and accordingly these articles came to be seized in the recovery panchanama (Exh.35). There is no reference in his evidence as to whether the police has drawn the memorandum panchanama as per the disclosure made by the appellant-accused before proceeding towards the spot to seize these articles. As per the arrest panchanama (Exh.9), the appellant came to be arrested in connection with the present crime on 29.06.2012. This panchanama (Exh.35) came to be drawn on 02.07.2012. It is also pertinent to note that even though

PW3-Chandrakant has deposed that the deceased-Aruna had submitted tray and went along with husband, the said tray along with some other articles shown to have been seized on 02.07.2012 under the panchanama (Exh.35). On careful perusal of the panchanama (Exh.35), it appears that one ticket machine, tray, purse, ticket hole maker, wearing clothes of deceased, khaki shirt with broken buttons, cash amount, watch and the shirt of the accused shown to have been seized under the panchanama (Exh.35). It further appears that the said articles shown to have been seized from the spot. It appears that the said articles were kept behind one Neem tree. We have carefully gone through the contents of the spot panchanama (Exh.37). On perusal of the same, it appears that the incident had taken place near one Babul tree. Various articles were seized from that place. We have minutely seen the map drawn on the spot panchanama (Exh.37). It appears that at a short distance from Babul tree, one standing neem tree is shown. As per the seizure panchanama (Exh.35), on 02.07.2012, the appellant-accused had shown certain articles lying near the neem tree. We are unable to understand as to when those articles were kept beneath the said neem tree which is at a short distance and the said neem tree is also shown in the map of the spot panchanama, what prevented the Investigating Officer to seize those articles immediately on 26.08.2012.

19.10 It is also pertinent to note that the panchanama (Exh.35) is a simple panchanama without there being any memorandum panchanama attached to it. Even PW10-Manohar Gholap has also not deposed anything about the disclosure statement made by the appellant-accused before leading to this place. However, the trial Court in paragraph no. 50(2)(b) has observed that "it may be the mistake of learned APP who has not referred separate memorandum as page No.77 to the witness P.W.10 Manohar Shivram Gholap and thus accepted the panchanama (Exh.35) without any further discussion on it".

19.11 It is again pertinent that PW3-Chandrakant, who is a driver of the ST bus, was not shown those seized articles belonging to the deceased-Aruna. Those are the articles of the MSRTC and the PW3-Chandrakant would have been the best witness to identify the said articles as being the property of the MSRTC.

19.12 Thus, the aspect of seizure of the property of certain incriminating articles appears to be doubtful. In view of the discussion above, we are not inclined to rely upon the seizure of those articles including the blood stained shirt of appellant-accused Vijay. The appellant-accused Vijay was found on baniyan immediately

after the incident. However, the Investigating Officer has not taken pains to find out as to where his shirt was lying near the spot though the said neem tree is at a short distance approximately 10 to 15 ft.

20. Prosecution has relied upon the CA report (Exh.81). The clothes of the deceased-Aruna including the scarf and the full shirt of the appellant-accused was found stained with the human blood of blood group 'B', however, the blood group of deceased-Aruna could not be determined as the results were inconclusive. Even assuming that as per the blood stains found on the clothes of the deceased, her blood was of group 'B', however, this circumstance is not helpful for the prosecution on two counts (i) the possibility cannot be ruled out that after the incident was over and till the arrival of the villagers, if the appellant-accused has looked after his wife who was lying unconscious, the blood stains may appear on his shirt. (ii) this important circumstnce about having blood stains of blood group 'B' on the shirt of the accused was not put to him in his examination under Section 313 of the Code of Criminal Procedure. Further, there is no reference about the articles seized at the time of drawing of spot panchanama (Exh.37). One pair of shoes of red colour was found near the spot, however, there is no reference as to whether the said pair of shoes belonged to the accused or some other persons.

21. In the case of **Vikramjit Singh Alias Vicky Versus State of Punjab** reported in (2006) 2 SCC 306 relied upon by the learned Counsel for the appellant-accused, the Hon'ble Apex Court in paragraph nos. 13 and 14 made the following observations :

> 13. In the instant case, there are two versions. The learned Sessions Judge proceeded to weigh the probability of both of them and opined that the appellant having not been able to prove its case, the prosecution case should be accepted. In our opinion, the approach of the learned Sessions Judge was not correct. The High Court also appeared to have fallen into the same error. It invoked Section 106 of the Indian Evidence Act although opining:
>
> > *"The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference."*
>
> 14. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute.

22. Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. In the instant case, the prosecution has not succeeded in proving the facts from which a reasonable inference can

be drawn regarding the existence of certain facts. Thus, the ratio laid down in the case of Vikramjit (supra) is squarely applicable to the facts and circumstances of the present case. In the instant case, there are also two views and in view of the ratio laid in the aforesaid case, the view which is in favour of the accused, should be accepted.

23. In a case of **Sharad Birdhichand Sarda Vs. State of Maharashtra** reported in 1984 SC 1622, the Supreme Court has laid down the following principles to appreciate the evidence when the prosecution case rests upon the circumstantial evidence.

> The following conditions must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence.
>
> 1. The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established.
>
> 2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> 3. The circumstances should be of a conclusive nature and tendency;
>
> 4. They should exclude every possible hypothesis except the one to be proved; and
>
> 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

. In the instant case, the facts so established by the prosecution are not consistent only with the hypothesis of the guilt of the accused. We do not think that the circumstnces brought on record by the prosecution are conclusive in nature and tendency. Unfortunately, there is no chain of circumstantial evidence. On the other hand, most of the circumstances that are discussed above are consistennt with the innocence of the accused.

24. The learned counsel for the appellant has placed reliance on the judgment in the case of **State of Haryana Versus Ram Singh** reported in (2002) 2 SCC 426 relied upon by the learned Counsel for the appellant-accused, wherein it is observd that if the discoveries and arrets made in presence of three interested witnesses, the same creates doubt of suspicion which must go to the benefit of the accused.

25. In the case of **Prakash Versus State of Karnataka** reported in (2014) 12 SCC 133, the Supreme Court has, in paragraph nos. 42 to 44, made the following observations.

> 42. Learned counsel for Prakash contended that the report of the serologist was not put to him when he was examined under Section 313 of the Code of Criminal Procedure. The High Court dealt with this issue in a rather unsatisfactory manner. This is what the High Court had to say:

> "Even assuming that the report of the Serologist had not been put to the accused in his statement recorded under Section 313 Cr.P.C. the same cannot be said to be fatal to the prosecution, more so, when the same had not prejudiced the accused in any way. In fact, we put the said Serologist's report Ex.P29 to the learned counsel appearing for the respondent and sought for their explanation in this regard and it is submitted that they have nothing to say in that matter. That means, the respondent has no explanation to offer in this regard."

43. It is one thing to say that no prejudice was caused to Prakash by not affording him an opportunity to explain the serological report. It is quite another thing to put the report to his learned counsel in appeal and give him (the learned counsel) an opportunity to explain the report of the serologist. The course adopted by the High Court is clearly impermissible. The law on the subject was laid down several decades ago by the Constitution Bench in Tara Singh v. State[24] and is to the effect that an accused must be given a chance to offer an explanation if the evidence is to be used against him and the conviction is intended to be based upon it. It follows that if the accused is not given an opportunity to explain the circumstances against him in the testimony of the witnesses, then those circumstances cannot be used against him, whether they prejudice him or not. This is what the Constitution Bench said:

> "It is important therefore that an accused should be properly examined under Section 342 [25] and, as their Lordships of the Privy Council indicated in Dwarkanath v. HYPERLINK "https://indiankanoon.org/doc/1009337/" HYPERLINK "https://indiankanoon.org/doc/1009337/"Emperor, [26] if a point in the evidence is considered important against the accused and the conviction is intended to be based upon it, then it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it if he so desires. This is an important and salutary provision and I cannot permit it to be slurred over. I regret to find that in many cases scant attention is paid to it, particularly in Sessions Courts. But whether the matter arises in the Sessions Court or in that of the Committing Magistrate, it is important that the provisions of section 342 should be fairly and faithfully observed."

44. This was more clearly spelt out in Ajay Singh v. State of Maharashtra[27] when this Court held:

> "A conviction based on the accused's failure to explain what he was never asked to explain is bad in law."

. In the instant case also, CA report (Exh. 81) was not put to the appellant-accused during his examination under Section 313 of Cr.P.C. for giving him an opportunity to explain the incriminating circumstance of having blood stains on his shirt. Thus, the ratio laid down by the Hon'ble Apex Court is squarely applicable to the facts of the present case.

26. Learned APP has relied upon the following cases :

i] In **Dhanaji Bhagwan Madne Versus State of Maharashtra**, reported in 2014 All.M.R. (Cri) 2837, the Division Bench of this Court has considered the fact that the accused has failed to offer a reasonable explanation in discharge of burden placed on him by Section 106 of the Evidence Act.

In the instant case, however, the accused has offered his reasonable explannation in discharge of the burden placed on him. Further, the prosecution has not succeeded in discharging its own burden to prove the case against the appellant-accused beyond doubt.

ii] So far as case **State of Punjab Versus Karnail Singh** reported in 2003 AIR (SC) 3609 is concerned, the same pertains to the appeal against acquittal wherein the issue of partition witnesses has been considered.

However, this case may not be applicable to the facts of the present case.

iii] In **State of Rajasthan Versus Thakur Singh** reported in 2014 (12) SCC 211, the Supreme Court has considered the provisions of Section 106 of the Evidence Act. In this case, by referring the case of **Trimukh Maroti Kirkan v. State of Maharashtra**, the Supreme Court has considered the provisions of Section 106 of the Evidence Act on the ground that the incident had taken place in the secrecy inside the house and thus it is incumbent upon the accused to explain circumstances appearing agaisnt him.

The ratio laid down in this case may not be applicable to the facts of the present case, which are very peculiar in nature.

iv] In the case of **Sucha Singh Versus State of Punjab** reported in 2001 AIR (SC) 1436, the Supreme Court has considered the provisions of Section 106 of the Evidence Act with the observations that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt.

27. In our considered opinion, the prosecution has failed to establish the chain of circumstantial evidence. The circumstances against the appellant-accused are not fully established. In the facts of the present case, it is difficult to say that the accused is guilty. At the

most, it can be said that the accused may be guilty. However, it is well settled that the suspicion however strong may be, the same cannot take the place of proof. In our considered opinion, the prosecution has failed to prove the case beyond reasonable doubt and the appellant-accused thus entitled to the benefit of doubt. Hence, we proceed to pass the following order :

ORDER

i] The Criminal Appeal is hereby allowed.

ii] The impugned judgment & order of conviction passed by the learned Additional Sessions Judge, Kopargaon dated 22nd August, 2014 in Sessions Case No. 4 of 2013, thereby convicting the appellant for the offence punishable under Section 302 of the Indian penal Code and sentencing him to suffer imprisonment for life and to pay fne of Rs.2,000/- (Rs Two Thousand only), in default of payment of fine to undergo simple imprisonment for a further period of three months, **is hereby quashed and set aside**. The appellant-accused is hereby **acquitted** of the offence punishable under Section 302 of the Indian Penal Code.

iii] The fine amount if deposited by the appellant shall be refunded to him.

iv] The Appellant/accused be released forthwith from the jail if not required in any other case or crime.

v] The appellant/accused Vijay Pandharinath Magar shall execute a P.B. of Rs.15,000/- (Rs. Fifteen Thousand) with one surety of the like amount to appear before the higher court as and when the notice is issued in respect of any appeal or petition filed against the judgment of this Court. Such bail bonds shall remain in force for a period of six months from the date of its execution.

vi] The order regarding return/disposal of the muddemal property stands confirmed.

vii] Record and Proceedings be sent to the trial Court with the special messenger forthwith.

vii] Criminal Appeal is accordingly disposed of.

[SANDIPKUMAR C. MORE]
JUDGE

[V. K. JADHAV]
JUDGE